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# The Legal Status and Influence of Decisions of International Organizations and other Bodies in the European Union

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# The Legal Status and Influence of Decisions of International Organizations and other Bodies in the European Union\*

Ramses A. Wessel and Steven Blockmans<sup>1</sup>

## 1. Introduction

The European Union's external action is not only defined by its influence on international developments, but also by its ability and the need to respond to those developments. While traditionally many have stressed the EU's 'autonomy', over the years its 'dependence' on global developments has become more clear.<sup>2</sup> International law has continued to play a key role in, not only in the EU's external relations, but also in the Union's own legal order.<sup>3</sup>

The purpose of this paper is not to assess the role or performance of the EU in international institutions.<sup>4</sup> Rather it purports to reverse the picture and focus on a somewhat under-researched topic: the legal status of decisions of international organizations in the EU's legal order.<sup>5</sup> While parts of the status of these decisions

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<sup>2</sup> See R.A. Wessel and S. Blockmans (Eds.), *Between Autonomy and Dependence: The EU Legal Order under the Influence of International Organizations*, The Hague: Asser Press / Springer, 2013.

<sup>3</sup> For a recent overview see also R.A. Wessel, *Close Encounters of the Third Kind: The Interface Between the EU and International Law after the Lisbon Treaty*, Stockholm: Sieps Report, 2013; as well as the contributions to E. Cannizzaro, P. Palchetti and R.A. Wessel (Eds.), *International Law as Law of the European Union*, Leiden/Boston: Martinus Nijhoff Publishers, 2012.

<sup>4</sup> Over the past years this topic was addressed by political scientists in particular. See for instance E. Drieskens and L. van Schaik (Eds.), *The EU and Effective Multilateralism: Internal and External Reform Practices*, London/New York: Routledge, 2014; K.E. Jørgensen and K.V. Laatikainen (Eds.), *Routledge Handbook on the European Union and International Institutions: Performance, Policy, Power*, London: Routledge, 2013; and S. Oberthür, K.E. Jørgensen and J. Shahin (Eds.), *The Performance of the EU in International Institutions*, London/New York: Routledge, 2013 (also published in *Journal of European Integration*, 2011); S. Blavoukos and D. Bourantonis (Eds.), *The EU Presence in International Organizations*, London/New York: Routledge, 2011; K.E. Jørgensen (Ed.), *The European Union and International Organizations*, London/New York: Routledge, 2009. Yet, also lawyers assessed the role of the EU in international organizations: R. Frid, *The Relations between the EC and International Organizations*, The Hague: Kluwer Law International, 1995; J. Sack, 'The European Community's Membership of International Organizations', *Common Market Law Review*, 1995, pp. 1127-1256; S. Marchisio, 'EU's Membership in International Organizations', in E. Cannizzaro (Ed.), *The European Union as an Actor in International Relations*, The Hague/London/New York: Kluwer Law International, 2002, pp. 231-260; F. Hoffmeister, 'Outsider of Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies', *Common Market Law Review*, 2007, pp. 41-68; R.A. Wessel, 'The Legal Framework for the Participation of the European Union in International Institutions', *Journal of European Integration*, 2011, pp. 621-635; S. Blockmans and R.A. Wessel (Eds.), *Principles and Practices of EU External Representation*, The Hague: CLEER Working Paper series, 2012; J. Wouters, J. Odermatt and Th. Ramopoulos, 'The Status of the European Union at the United Nations General Assembly', in I. Govaere et al. (Eds.), *The European Union in the World: Essays in Honour of Marc Maresceau*, Leiden/Boston: Martinus Nijhoff Publishers, 2014, pp. 211-223.

<sup>5</sup> With the notable exception of N. Lavranos, *Legal Interaction between Decisions of International Organizations and European Law*, Groningen: Europa Law Publishing, 2004, this topic has received

relate to the status of international agreements and international customary law, it can be argued that decisions of international organizations and other international bodies form a distinct category. In fact, it has been observed that “this phenomenon has added a new layer of complexity to the already complex law of external relations of the European Union”.<sup>6</sup> Emerging questions relate to the possible difference between decisions of international organizations of which the EU is a member (such as the FAO) and decisions of organizations where it is not (irrespective of existing competences in that area – such as in the ILO). Questions also relate to the hierarchical status of these decisions in the EU’s legal order and to the possibility of them being invoked in direct or indirect actions before the Court of Justice.

This contribution takes a broad perspective on decisions of international organizations by including decisions taken in other international institutions which do not necessarily comply with the standard definition of international organizations,<sup>7</sup> be it bodies set-up by multilateral conventions or informal (transnational / regulatory) bodies. Some of these bodies are relatively close to the EU (such as the Councils established by Association Agreements – see further Section 5 below); others operate at a certain distance. Limiting the analysis to formal international organizations will not do justice to the manifold relationships between the European Union and various international bodies and to the effects of the norms produced by these bodies. The term ‘international decisions’ is therefore used to refer to any normative output of international institutional arrangements.

## **2. ‘International Decisions’: The Changing Role of International Organizations**

Assessing the status of decisions of international organizations as a separate category in the EU’s legal order implies that these decisions can be a source of law. Whereas treaties (international agreements) and custom are undisputed as sources of international law and are as such also mentioned in Article 38 of the Statute of the International Court of Justice, the role and function of decisions of international organizations in international law is less clear. Yet, by now the notion that international organizations can take decisions and that these decisions may be legally binding is well-accepted.<sup>8</sup> International organizations have found their place in global governance,<sup>9</sup> and are even considered ‘autonomous actors’, following an

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surprisingly little attention in academic publications. See earlier also D. Bethlehem, ‘International Law, EC Law, National Law: Three Systems in Search of A Framework’, in M. Koskeniemi (Ed.), *International law Aspects of the EU*, The Hague: Martinus Nijhoff Publishers, 1998, pp. 169-196. For a specific category see also: B. Martenczuk, ‘EC Law-Making Through International Bodies’, in V. Kronenberger (Ed.), *The European Union and the International Legal Order: Discord or Harmony?*, The Hague: T.M.C. Asser Press, 2001, pp. 141-163.

<sup>6</sup> Martenczuk, at 162. In this citation ‘Community’ was replaced by ‘Union’.

<sup>7</sup> International organizations can be defined in many ways. The most recent definition laid down in an international legal document may very well be the one of the International Law Commission in the 2011 Articles on the Responsibility of International Organizations (see below), which defined an international organization as “an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities.” See more extensively S. Bouwhuis, ‘The International law Commission’s Definition of International Organizations’, *International Organizations Law Review*, 2012, pp. 451–465. The definition by Schermers and Blokker is also commonly used: “international organizations are defined as forms of cooperation (1) founded on an international agreement; (2) having at least one organ with a will of its own; and (3) established under international law.” H.G. Schermers and N.M. Blokker, *International Institutional Law: Unity within Diversity*, Leiden/Boston: Martinus Nijhoff Publishers, 2011, at p. 37.

<sup>8</sup> Schermers and Blokker, *op.cit.*, at p. 832 et seq.

<sup>9</sup> I.F. Dekker and R.A. Wessel, ‘Governance by International Organisations: Rethinking the Source and Normative Force of International Decisions’, in I.F. Dekker and W. Werner (Eds.), *Governance and International Legal Theory*, Leiden/ Boston: Martinus Nijhoff Publishers, 2004, pp. 215-236.

agenda that is no longer fully defined by their Member States,<sup>10</sup> which has caused the latter to devote much of their time and energy to responding to what has been termed the 'Frankenstein problem'.<sup>11</sup>

There is nothing new in arguing that international organizations engage in decision-making in a sense that can even be viewed as 'law-making'.<sup>12</sup> Apart from the fact that states (but also the EU) may use international organizations as frameworks for *treaty-making*, it is well-accepted that also many *decisions* of international organizations can be seen as 'law'.<sup>13</sup> Institutional law-making has moved beyond the traditional methods and actors and is increasingly studied in a broader sense, including new actors and new regulatory activities.<sup>14</sup>

The role of many international institutions developed well beyond a 'facilitation forum', underlining their autonomous position in the global legal order.<sup>15</sup> In those cases law-making takes place on the basis of well-defined procedures with an involvement of institutional actors other than states, but also on the basis of a sometimes dynamic interpretation of the original law-making mandate of the organization.<sup>16</sup> Indeed, the outcome comes closer to a *decision* of an international organization than to an international *agreement* concluded between states. In fact, it could be argued that this is what 'institutional law-making' is all about: it is law-making *by* international institutions (be it formal international organizations or other international bodies<sup>17</sup>) and less about law-making *through* international institutions (although the latter continues to exist in the form of for instance Conferences of States Parties of multilateral conventions or bodies set up by these conventions).<sup>18</sup> It has even become quite common to regard these types of acts as contributing to the

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<sup>10</sup> N.D. White and R. Collins (Eds.), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order*, Routledge, 2011.

<sup>11</sup> A. Guzman, 'International Organizations and the Frankenstein Problem', *European Journal of International Law*, 2013, pp. 999-1025; Cf. also J. Klabbers, *An Introduction to International Institutional Law*, Cambridge: Cambridge University Press, 2009 (2<sup>nd</sup> ed.).

<sup>12</sup> Cf. A. Boyle and C. Chinkin, *The Making of International Law*, Oxford: Oxford University Press, 2007, at vii: "Law-making is no longer the exclusive preserve of states". The scope of this Paper does not allow us to address the notion of 'law' and the question of its sources. Yet, obviously, using the term 'law-making' somehow implies that we accept legal effects of the norms addressed here, be it through customary law or simply because we accept the competence of the international institutions to enact legal norms.

<sup>13</sup> One of the most influential books may very well have been J. Alvarez, *International Organizations as Law-Makers*, Oxford: Oxford University Press, 2005.

<sup>14</sup> J. Pauwelyn, R.A. Wessel and J. Wouters (Eds.), *Informal International Lawmaking*, Oxford: Oxford University Press, 2012 and A. Berman, S. Duquet, J. Pauwelyn, R.A. Wessel, and J. Wouters (Eds.), *Informal International Lawmaking: Case Studies*, Oslo: TOAEP, 2013.

<sup>15</sup> R. Collins and N.D. White (Eds.), *International Organizations and the Idea of Autonomy: Institutional Independence in the International Legal Order*, London/New York: Routledge, 2011.

<sup>16</sup> J. Wouters and Ph. De Man, 'International Organizations as Law-Makers', in J. Klabbers and A. Wallendahl (Eds.), *Research Handbook on the Law of International Organizations*, Cheltenham/Northampton: Edward Elgar Publishing, 2011, pp. 190-224 at 192: "It is possible [...] that the treaty provisions pertaining to the law-making powers of the organization will be construed in a different way than was originally intended by the drafting nations, as it proves very difficult to draft an instrument in such a manner as to effectively preclude any other possible interpretation."

<sup>17</sup> Cf. for instance M. Fitzmaurice, 'Law-making and International Environmental Law: the legal Character of Decisions of Conference of the Parties', in R. Lijova and J. Petman (Eds.), *International Law-Making: Essays in Honour of Jan Klabbers*, London/New York: Routledge, 2014, pp. 190-210; and in the same volume G. Ulfstein, 'Law-making by Human Rights Treaty Bodies', pp. 249-257.

<sup>18</sup> See more extensively R.A. Wessel, 'Institutional Law-Making: The Development of a Global Normative Web', in C. Bröllman and Y. Radi (Eds.), *Research Handbook on the Theory and Practice of International Law-Making*, Cheltenham/Northampton: Edward Elgar Publishing, 2014 See on these two dimensions of international organizations J. Klabbers, 'Two Concepts of International Organization', *International Organizations Law Review*, 2005, pp. 277-293; as well as his 'Contending Approaches to International Organizations: Between Functionalism and Constitutionalism', in Klabbers and Wallendahl, *op.cit.*, pp. 3-30.

development of 'world legislation'.<sup>19</sup> Yet, situations clearly differ. While some international organizations are well-established and display 'autonomous' powers, in other cases institutionalisation is 'light' and serves as an ad hoc vehicle for a multilateral diplomatic process. In these cases conferences are not much more than meeting points, facilitating states to conclude treaties.<sup>20</sup> Similar processes also take place within more permanent structures, including formal international organizations. Obvious examples include the UN General Assembly<sup>21</sup> and the UN specialised agencies.<sup>22</sup> In these cases an important function of international organizations is to reveal state practice (and *opinio juris*)<sup>23</sup> and to allow for a speedy creation of customary law, although one needs to remain aware of the distinction between state practice and the practice of an international organization.<sup>24</sup> Furthermore, the fact that many international conventions incorporate generally accepted international rules, standards, regulations, procedures and/or practices may effectively transform a number of codes, guidelines and standards created by international organizations and bodies into binding norms. This reveals the complexity of institutional decision-making: it is not just about clearly legally binding decisions of international organizations; it may very well be about an acceptance of rules and standards because there is simply nothing else and the rules need to be followed in order for states to be able to play along. At the same time international organizations often adopt rules or standards developed in another organization and with less than 200 states they are bound to run into each other in many different institutions. 'International decisions' may perhaps also take shape in the form of 'case law' rather than as decisions of an organ of an international organization. The legal order of the European Union has largely been shaped on the basis of case law that, allegedly, went beyond what states originally (though to have) agreed on in the treaties. Less prominent examples may be found in other international organizations. Thus, the WTO's Dispute Settlement Body (DSB) has been said to be proof of the organization's 'legislative' or 'adjudicative' powers.<sup>25</sup> Finally, the set of international institutions encompasses not only formal international organizations, but also other international bodies, consisting of governmental representatives and/or other stakeholders. There are indications that these international decisions outnumber the traditional forms.<sup>26</sup> In the study of institutional

<sup>19</sup> See the different contributions to the forum on 'World Legislation' in *International Organizations Law Review*, 2011, No. 1. Cf. H.J. Schermers and N.M. Blokker, *op.cit.* at p. 1066 (par. 1657) "It is submitted that international organizations empowered to issue Decisions have legislative capacity".

<sup>20</sup> Wouters and De Man (*op.cit.* at 205) have argued that in these cases International organizations "merely act as agents, since they only propose draft conventions through gathering information and offering their expertise, which then may or may not be entered into by the member states".

<sup>21</sup> Following Art. 13 of the UN Charter, which refers to its responsibility for "encouraging the progressive development of international law and its codification".

<sup>22</sup> See for examples also Boyle and Chinkin, *op.cit.* at 124-141.

<sup>23</sup> Cf. the ICJ's advisory opinion on the *Legality of the threat or use of nuclear weapons* [1996] ICJ Rep. 226: "General Assembly resolutions [...] can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*. To establish whether this is true of a given General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an *opinio juris* exists as to its normative character. Or a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule."

<sup>24</sup> Wouters and De Man, *op.cit.* at 207-208. Once consensus has been reached within an international organization, it will be difficult for states to deny their acceptance of a norm and to be recognised as a 'persistent objector'. See for the decision-making powers of many international organizations and other international bodies: J. Alvarez, *International Organizations as Law-Makers*, Oxford: Oxford University Press, 2005.

<sup>25</sup> See in particular N. Lavranos: *Decisions of International Organizations in the European and Domestic Legal Orders of Selected EU Member States*, Groningen: Europa Law Publishing, 2004.

<sup>26</sup> See J. Pauwelyn, J. Wouters and R.A. Wessel, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking', *European Journal of International Law*, 2014; but also Pauwelyn, Wessel and Wouters (Eds.), *Informal International Lawmaking*, *op.cit.*



decision-making it became clear that many norms originate in other international bodies or form part of a much broader international debate, including many different actors. The emerging picture is one of a broad range of international normative fora, from intergovernmental organizations with a broad mandate (see above), treaty-based conferences that do not amount to an international organization (e.g. Conferences of the Parties under the main multilateral environmental agreements, such as the Framework Convention on Climate Change and the Kyoto Protocol), informal intergovernmental co-operative structures (e.g. the G20, the Financial Action Task Force on Money Laundering, the Basel Committee on Banking Supervision), and even private organizations that are active in the public domain (e.g. the International Organization for Standardization (ISO), or private regulation of the internet by the Internet Corporation for Assigned Names and Numbers (ICANN), The Internet Engineering Task Force (IETF) or the Internet Society (ISOC)).<sup>27</sup>

Given the EU's connection to all these different formal and informal normative processes, the question is to which extent international decisions impact the EU's legal order. The following sections will address this question in more detail.

### 3. The EU Treaties and International Organizations

Apart from changes in the roles of international organizations, the relation between the EU and international organizations has also changed. From a political science perspective Jørgensen pointed to the idea that “reactive policies have been left behind [...]. [W]hereas the European Union in the past may have been an organization in need of learning about international affairs, the European Union now seems to master several of the disciplines of international relations.”<sup>28</sup> And, as will be highlighted below: there seems to be a ‘two-way flow of influence’ which includes both an instrumental use by the EU of international organizations and an influence of international organizations on EU policies and policy-making.<sup>29</sup>

The current EU Treaties reflect this new interest in international organizations (see below). Apart from its participation in a number of actual international organizations, the institutionalization of the role of the EU in the world is reflected in its position in international regimes in various policy fields, either as a full member or as an observer.<sup>30</sup> The position of the EU in international institutions is part and parcel of EU external relations law and it is at these fora that a *structural* role of the EU in global governance becomes most visible. Moreover, it is this role that has become more interesting now that it becomes clear that many EU (and national) rules find their origin in decision-making processes in other international organizations.

It is generally held that the participation in a formal international organization relates to the participation in its organs; i.e. the right to attend the meetings, being elected for functions in the organ, and exercising voting and speaking rights. In that sense the term influence is related to the output of the international organization (UN, ICAO, etc.): decisions (often recommendations, in some occasions binding decisions) and conventions (international agreements prepared and adopted by an organ of an international organization). In addition the EU participates in less formal international

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<sup>27</sup> More extensively on the normative activities of these bodies: R.A. Wessel, ‘Regulating Technological Innovation through Informal International Law: The Exercise of International Public Authority by Transnational Actors’, in M.A. Heldeweg and E. Kica (Eds.), *Regulating Technological Innovation: A Multidisciplinary Approach*, Basingstoke: Palgrave MacMillan, 2011, pp. 77-94.

<sup>28</sup> Jørgensen, *The European Union and International Organizations*, *op.cit.*, at 4-5.

<sup>29</sup> *Ibid.*

<sup>30</sup> F. Hoffmeister, ‘Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies’ (2007) 44 *Common Market Law Review* 41-68. Parts of this section are also dealt with more extensively in B. van Vooren and R.A. Wessel, *EU External Relations Law: Text, Cases and Materials*, Cambridge: Cambridge University Press 2014, Chapter 8.

institutions (or regimes) such as the G-20 for example. The Treaties herald an increase of the engagement of the EU in other international institutions, including the future membership of additional international organizations such as the Council of Europe (Article 6 TEU).

The absence of a clear and explicit competence means that the participation in (and the membership of) international institutions is predominantly based on implied powers, which find their source in the general competences the Union enjoys in the different policy fields. Thus, the Union's membership of the Food and Agricultural Organization (FAO) is based on the Articles 43 TFEU (agriculture and fisheries), 207 TFEU (commercial policy) and 209 TFEU (development cooperation). However, as we will see below, there are specific policy areas where *cooperation* with international organizations is expressly incorporated into the TFEU.

What comes closest to a general competence-conferring provision is Article 211 TFEU: "Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations." That this 'cooperation' may also lead to the establishment of legal relationships can be derived from the provisions creating a competence for the Union to conclude international agreements. Article 216(1) TFEU also refers to international organizations: "The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.". And Article 217 TFEU adds: "The Union may conclude with one or more third countries or international organisations agreements establishing an association involving reciprocal rights and obligations, common action and special procedure."

The procedures to conclude these international agreements are to be found in Articles 218 and 219(3) TFEU. So called, 'constitutive agreements' by which new international organizations are created, or accession agreements to acquire membership of an international organization are not excluded. In fact, in *Opinion 1/76* the Court of Justice of the European Union (CJEU) has established that the EU's competences in the field of external relation included the power to create new international organizations.<sup>31</sup> Both the European Economic Area (EEA) and the 'associations' created by association agreements serve as examples of international organizations created by (at that time) the European Community. At the same time, in *Opinion 1/94* the Court implicitly accepted a role of the EU as one of the founding members of the WTO. Although not explicitly regulated, this also seems to imply a competence of the EU to fully participate in so-called 'treaty-regimes', on the basis of a formal accession to a treaty (e.g. the UN Framework Convention on Climate Change and the Kyoto Protocol, which were formally ratified by the European Union in 1993 and 2002 respectively). As in formal international organizations, participation of the EU is either based on decisions by the participating states to grant the EU observer or full participant status, or on the inclusion of a Regional Economic Integration Organization (REIO) clause in international conventions.<sup>32</sup> For example, Article II of the FAO Constitution was specifically modified to allow for the accession of 'regional economic organizations'. A REIO is commonly defined in UN protocols and conventions as "an organization constituted by sovereign states of a given region to which its Member States have transferred competence in respect of matters governed by [...] convention or its protocols and [which] has been duly authorised, in

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<sup>31</sup> *Opinion 1/76 Draft Agreement establishing a European laying-up fund for inland waterway vessels* [1977] ECR 741, par. 5.

<sup>32</sup> See on the qualification of the EU as an international (integration) organization also C. Eckes and R.A. Wessel, 'The European Union: An International Perspective', in T. Tridimas and R. Schütze (Eds.), *The Oxford Principles of European Union Law – Volume 1: The European Union Legal Order*, Oxford: Oxford University Press, 2014.



accordance with its internal procedures, to sign, ratify, accept, approve or accede to it [the instruments concerned].”<sup>33</sup> In the United Nations Convention on the Rights of Persons with Disabilities, the REIO clause seems to have evolved to a RIO (Regional Integration Organization) clause, which does justice to the large scope of activities of the EU these days. In Article 44 of that Convention, a “Regional integration organization’ shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention.” Since Member States usually have retained certain competences, ‘mixed agreements’ are the appropriate instrument for the EU and its Member States to engage in international institutions in which both participate fully.

Express competences are not always needed for the EU to join an international organization by concluding an international agreement. It is well known that, ever since the 1971 *ERTA* case, the CJEU also acknowledged the treaty-making capacity of the Union in cases where this was not explicitly provided for by the Treaty. This means that international agreements, including the ones whereby the EU becomes a member of another international organization or participates in a treaty-regime (Opinion 1/94 WTO), may also be based on the external dimension of an internal competence. This is also confirmed by Article 216(1) TFEU, which – as we have seen – explicitly refers to international organizations: “The Union may conclude an agreement with one or more third countries or international organisations [...]” At least to establish membership of the EU in international organizations, this provision seems to give a broad mandate to the EU to also conclude international agreements in order to become a member of an international organization or to join a treaty-regime.

Irrespective of these more *general* indications of a competence to engage in international institutions, the Treaties explicitly refer to a number of *specific* policy terrains or international organizations. Thus, Article 37 TEU allows for international agreements to be concluded “with one or more states or international organizations” in the area of the common foreign and security policy (CFSP). Similar provisions may be found in relation to development cooperation (Art. 209(2) TFEU), economic, financial and technical cooperation (Art. 212(3) TFEU) and humanitarian aid (Art. 214(4) TFEU). In the environmental sphere, the Treaty reads that “Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations” (Article 191(4) TFEU). In the field of humanitarian aid, the Treaty refers to “international organizations and bodies, in particular those forming part of the United Nations system” to coordinate operations with (Art. 214(7) TFEU). The United Nations (and its Charter) is also mentioned in relation to a number of other policy areas of the Union (Articles 3(5) TEU, 21(1-2) TEU, 34(2) TEU, 42(1 and 7) TEU, 208(2) TFEU, 214(7) TFEU, and 220(1) TFEU) (see also below). In relation to development cooperation a number of provisions have been included to strengthen explicitly commitments of both the Union and its Member States in that area. Thus, Article 208(2) TFEU provides the following: “The Union and the Member States shall comply with the commitments and take account of the objectives they have approved in the context of the United Nations and other competent international organisations.” Article 210(1) TFEU adds to that an obligation of coordination, which means concretely that the EU and Member States must take account of the Millennium Development Goals (MDGs), and their planned post-2015 follow-up (‘Sustainable Development Goals’ or SDGs), drawn up in the context of the United Nations. In addition one may come across some references in relation to the European Central

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<sup>33</sup> See for instance Articles 4.1, 4.2, 4.3 and 4.5, 21 and 22 of the Kyoto Protocol.

Bank and the European Investment Bank (see Protocols Nos. 4<sup>34</sup> and 5 to the Treaty (Article 14)). A somewhat more general provision, and the first one in a specific Treaty Title on 'The Union's Relations with International Organisations and Third Countries and Union Delegations' is Art. 220(1) TFEU: "The Union shall establish all appropriate forms of cooperation with the organs of the United Nations and its specialised agencies, the Council of Europe, the Organisation for Security and Cooperation in Europe and the Organisation for Economic Cooperation and Development. The Union shall also maintain such relations as are appropriate with other international organisations."

This short overview reveals that the competences of the EU in relation to international institutions are fragmented and scattered across the Treaties. Apart from these competences of the EU itself, many of the provisions relate to 'cooperation' or to the role of Member States. Thus, the idea to foster cooperation with third countries and competent international organizations returns in fields of education and sport (Art. 165(3) TFEU), vocational training (Art. 166(3) TFEU), culture (Art. 167(3) TFEU) and public health (Art. 168(3) TFEU). A similar promotion of cooperation with other international organizations is mentioned in relation to social policy (Art. 156 TFEU) and cooperation in Union research, technological development and demonstration (Art. 180(b) TFEU). In addition, the Union's foreign and security policy includes a number of rules on the way in which the EU wishes to present itself in international organizations, including the representation by the High Representative (Art. 27(2) TEU), the cooperation between diplomatic missions of the Member States and the Union delegations (Art. 33 and 35 TEU), the coordination of Member States' actions (Art. 34 TEU) and the general competence to conclude international agreements with international organizations in the area of CFSP (Art. 37 TEU).

Finally, the EU Treaties present the United Nations and its Charter as the guiding legal framework for the EU in its external relations. Article 3(5) TEU mentions "respect for the principles of the United Nations Charter" as part of the "the strict observance and the development of international law" which are to be pursued by the EU. Similar wordings reappear in Article 21 TEU of the general provisions on the Union's external action. In fact, the promotion of "multilateral solutions to common problems" should be done "*in particular* in the framework of the United Nations".<sup>35</sup> Finally, as reflected in the Preamble to the TFEU, UN law not only guides the external relations of the Union, but also its internal relation with its overseas countries. The Member States announced that they intent to "confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations."

Article 42(1) TEU provides that the Union may use its civilian and military assets missions outside the Union for peace-keeping, conflict prevention and strengthening international security, and again this should be done "in accordance with the principles of the United Nations Charter." In fact, the Treaties foresee the possibility of EU missions operating in a UN framework. The preamble of Protocol 10 to the Treaties refers to the fact that "the United Nations Organisation may request the Union's assistance for the urgent implementation of missions undertaken under Chapters VI and VII of the United Nations Charter." Similarly, UN law forms the legal framework for actions in relation to the new collective defence obligation in Article 42(7) TEU: "If a Member State is the victim of armed aggression on its territory, the other Member States shall have towards it an obligation of aid and assistance by all

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<sup>34</sup> Article 6(2): "The ECB and, subject to its approval, the national central banks may participate in international monetary institutions." See also Article 23 on external operations.

<sup>35</sup> Emphasis added.

the means in their power, in accordance with Article 51 of the United Nations Charter [the provision on (collective) self-defence].”

The attention to the United Nations and its principles in the EU treaties is thus overwhelming. In fact, the United Nations is referred to 19 times in the current EU treaties (including the Protocols and Declarations). Irrespective of the CJEU’s judgment in the *Kadi* cases, which seemed to emphasise the Union’s own principles,<sup>36</sup> the EU member states which signed off on the Lisbon Treaty obviously regard many of the EU’s actions as being part of a global governance programme. With a view to the legal regime governing the EU-UN relations, one may conclude that most of the provisions aim to regulate EU policy in a *substantive*, rather than an institutional manner. EU foreign policy is to take place within the limits set by UN law. This holds true for external relations in general, and for CFSP, CSDP, and development cooperation in particular. Much less the treaties offer *institutional* improvements to allow the EU and the UN to become ‘partners in multilateralism’.<sup>37</sup>

#### 4. The Influence of International Decisions on the EU: Empirical Evidence

Given these extensive references in the EU treaties to international organizations (indicating even an occasional voluntary dependence of the EU on international decisions), the question is to which extent decisions of these organizations actually impact the EU. Over the years many empirical case studies revealed an influence of international organizations on the EU, including a possibility that international organizations have been ‘teaching’ the European Union, in particular in areas where it was a relative newcomer (such as health (the WHO), the monetary and financial system (IMF, and World Bank) or international security (NATO)).<sup>38</sup> Research – including a project lead by the present authors<sup>39</sup> – has furthermore shown that we also witness a *normative* influence of international organizations on the EU legal order and that this may put the cherished ‘autonomy’ of that order into perspective.<sup>40</sup> The influence of international norms varies considerably and reflects the constant struggle between an openness to international law and norms developed at the international level and the idea of an autonomous legal order that is there for the Court to preserve. Obviously, ‘influence’ is a matter of degree and here we use it to denote *the effect of norms created in or by international organisations on EU norms*. The issue can be approached from two sides: the international organization in question should have the capacity or power to exercise its influence (there has to be an institutional and substantive link), and the EU must be willing or compelled to ‘receive’ the influence. Influence is not a legal concept and lawyers are not used to work with it (perhaps because it would imply the actual ‘measuring’ of effects – something that is also beyond the scope of the present Paper). In their recent book, Oriol Costa and Knud Erik Jørgensen reveal that “under certain circumstances international institutions [indeed] shape both policies and policy-making processes, even in ways sometimes unintended by the EU, or undesired by some member states”.<sup>41</sup> They point to the fact that in IR-theory different ‘mechanisms’ to exert influence have been noticed, which may (1) provide opportunities or constraints to

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<sup>36</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351; and Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission et al. v. Yassin Abdullah Kadi* [2013] ECR, n.y.r.

<sup>37</sup> J. Wouters, *The United Nations and the European Union: Partners In Multilateralism* (Leuven Centre for Global Governance Studies: Working Paper No. 1, 2007).

<sup>38</sup> Jørgensen, *The European Union and International Organizations*, *op.cit.*, at 8-9.

<sup>39</sup> Wessel and Blockmans, *op.cit.*

<sup>40</sup> J.W. van Rossem, ‘The Autonomy of EU Law: More is Less?’, in Wessel and Blockmans, *op.cit.*, 13-46.

<sup>41</sup> O. Costa and K.E. Jørgensen (Eds.), *The Influence of International Institutions on the EU*, London: Palgrave 2012.

actors, (2) change their ability to influence decision-making by changing the distribution of power, (3) establishing or spreading norms and rules, or (4) creating path dependencies. The emerging picture is a complex set of formal and (sometimes very subtle) informal ways in which international organizations (and other multilateral fora) influence the EU. The degree of influence may then also depend on the 'institutional strength' of the international organization. Some research showed that "international institutions embodied in toothless non-binding agreements should have less influence on the EU than fully-fledged international institutions including binding treaties and meetings of regular fora."<sup>42</sup> At the same time, it is well-known that 'domestic conditions' are an important factor for the degree of influence.<sup>43</sup>

In the end, IR-theory teaches us that the different mechanisms and degrees of influence may have different consequences. Apart from 'normative influence', it is equally possible to find elements of 'institutional consequences', including the role EU and Member State actors can play in international institutions and the way in which formal decision-making processes are used in practice. There is indeed an interaction between the EU and many international organizations, underlining the coming of age of the European Union as a polity. Whereas for an international organization as the EU<sup>44</sup> stressing its autonomy is necessary to establish its position both vis-à-vis its own Member states and in the global legal order, its further development sets the limits to that autonomy. In many policy areas the EU has become a global player and everything it does cannot be disconnected for normative processes that take place in other international organizations. This process does come with the same tension that sovereign states face, i.e. how to square the preservation of one's institutional and constitutional values with accepting a certain dependence of the outside world.

More legally oriented research seems to support the findings of political scientists and IR-theorists: international decisions also normatively influence the creation and interpretation of EU decisions,<sup>45</sup> and – more generally – global, EU and domestic norms are increasingly interconnected.<sup>46</sup> A recent research project reveals that the influence of international norms varies considerably and reflects the constant struggle between an openness to international law and norms developed at the international level and the idea of an autonomous legal order that is there for the Court of Justice of the EU (CJEU) to preserve.<sup>47</sup> The picture emerging from this study is a complex set of formal and (sometimes very subtle) informal ways in which international organizations and other multilateral fora influence the EU. The degree of the normative influence of international bodies on the EU and its legal order depends on a raft of factors, ranging from the binding obligations resulting from EU membership and full participation in other international organizations, to the voluntary reception or outright rejection of international norms by the EU legislator and Court of Justice. At the same time, 'domestic conditions' are also an important factor for the degree of influence. Whereas the EU is a unique and very complex legal construction, the

<sup>42</sup> As paraphrased by Costa and Jørgensen 2012

<sup>43</sup> *Ibid.*

<sup>44</sup> Indeed, we consider the EU as an international organization. See Eckes and Wessel, *op.cit.*

<sup>45</sup> See the contributions to Wessel and Blockmans, *op.cit.* That we are not only dealing with formal decisions by formal international organizations, but also with norms created in other (informal/regulatory) bodies flows from the many case studies in the 'informal international lawmaking' project: J. Pauwelyn, R.A. Wessel and J. Wouters (Eds.), *Informal International Lawmaking*, Oxford: Oxford University Press, 2012; and A. Berman, S. Duquet J. Pauwelyn, R.A. Wessel, and J. Wouters, (Eds.), *Informal International Lawmaking: Case Studies*, The Hague: Torkel Opsahl Academic EPublisher, 2012.

<sup>46</sup> A. Føllesdal, R.A. Wessel and J. Wouters (Eds.), *Multilevel Regulation and the EU: The Interplay between Global, European and National Normative Processes*, Leiden/Boston: Martinus Nijhoff Publishers, 2008. Earlier see already Bethlehem, *op.cit.* at 195: "Just like a web, or net, is made up of numerous strands criss-crossing at various point while, at the same time, going in different direction, so is the relationship between international law, Community law and national law; interacting constantly even though the focus may be slightly different."

<sup>47</sup> Wessel and Blockmans, *op.cit.*

separateness of the EU both from national and international law are still propagated by the Court of Justice's autonomous interpretation of EU law, and its exclusive jurisdiction therein. In view of globalisation's growing interconnectedness between all sorts of subjects of international law, and the waning economic and financial power of the European Union on the international plane, the Court's refusal to take account of international law in order to protect the unity of the internal market becomes increasingly untenable. This is all the more so because the Court's recently displayed attitude towards the reception of international law in the EU legal order forms an impediment to meeting the EU's constitutional duties in its relations with the wider world, most notably full respect for international law, whether this emanates from international organizations with legal personality or less institutionalised international regimes.

There is thus empirical evidence of the intense legal interactions between the EU and a representative body of international institutions and we will mention some key examples, without attempting to be exhaustive, and mainly drawing on an earlier research project on this topic led by the present authors.<sup>48</sup> The influence of Security Council resolutions has been given abundant attention in relation to the *Kadi* saga. And will for that reason not be dealt with extensively here.<sup>49</sup> But also other rules, standards, codes of conduct, guidelines, principles, recommendations and best practices developed within a variety of international organizations and bodies influence the development of EU law, even if they are not strictly legally binding upon the Union. Thus, norms developed within several bodies, be it within the UN family such as the Food and Agriculture Organization (FAO), the Codex Alimentarius Commission and the World Health Organization (WHO), or the OECD, the G20 and some of the machinery this 'international regime' has brought to life, such as the Financial Stability Board (FSB), and specific bodies bringing together financial watchdogs like the Basel Committee on Banking Supervision (BCBS) and the International Organization of Securities Commissions (IOSCO) – have been dealt with within the EU legislature and/or judiciary. As it happens, the Union seems to have a somewhat ambivalent relationship with international bodies and the numerous norms they develop. The EU legislature demonstrates openness towards these norms and often directly refers to the international processes that led to their development. This is the case especially where the EU is represented in the international body at hand, helps to shape the rules, and where the EU has an interest in seeing them implemented. Indeed, much of the EU's recent legislation in financial governance explicitly mentions commitments made at the international level, in particular within the G20. In case law, however, the Court of Justice of the EU has rarely relied on norms emanating from these bodies in a substantive fashion. While the CJEU sometimes refers to such norms, it has often given a more autonomous meaning to the EU rules concerned.<sup>50</sup>

An analysis of the impact of the WTO's dispute settlement mechanism and the European Court of Human Rights (ECtHR) on the EU legal order, reveals that the Court has so far not accepted that it must be bound by the decisions of any external (quasi-)judicial body. Yet, both EU law (Article 6(3) TEU) and the status of the ECHR (a "constitutional instrument of European public order") can be cited in support of the argument that the decisions of the ECtHR require and deserve greater force than the decisions of other external (quasi-)judicial bodies, including the WTO dispute settlement bodies. With the Member States enjoying the convenience, the EU has

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<sup>48</sup> The project 'Between Autonomy and Dependence' was initiated by the Centre for the Law of EU External Relations (CLEER) in The Hague and resulted, *inter alia*, in the edited volume mentioned supra (Wessel and Blockmans, *op.cit.*). Cf. also Føllesdal, Wessel and Wouters, *op.cit.*

<sup>49</sup> See among the many publications on this issue A. Gattini, 'Effects of Decisions of the UN Security Council in the EU Legal Order', in Cannizzaro et al., *op.cit.*, pp. 215-227.

<sup>50</sup> J. Wouters and J. Odermatt, 'Norms Emanating from International Bodies and Their Role in the Legal Order of the European Union', in Wessel and Blockmans, *op.cit.*, 47-68.

taken over adjudication in the WTO. Eckes has observed that the negotiations surrounding the accession of the EU to the ECHR provide the most recent example where the EU's autonomy concern has posed and will continue to pose many questions.<sup>51</sup> More in general a number of Council of Europe conventions are today part of the EU's *acquis* in the field of freedom, security and justice (e.g., the 2008 Council Framework Decision on combating terrorism, and the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union aimed at supplementing and facilitating the application, between the EU Member States, of the 1959 European Convention on Mutual Assistance in Criminal Matters).<sup>52</sup>

The influence of the WTO on the EU cannot be understated. WTO primary and secondary law have had a considerable influence on EU primary and secondary law and their interpretation. Much of the EU's primary law on the free circulation of goods has been inspired by GATT 1947, and the integration of new trade subjects into the WTO 1994 triggered a constitutional process of expanding the EU's exclusive powers concerning commercial policy. Moreover, many pieces of secondary EU legislation either transpose WTO norms or have been modified to bring them into line with world trade standards after adverse WTO judicial decisions. The underlying reason for this openness may be that the EU's political institutions expect WTO rules in this area to have been largely influenced by its own practice on the matter and are thus considered to be fully legitimate.<sup>53</sup>

While IMF law as such has a limited influence on EU law in the sense of the IMF's power to affect EU law, it nevertheless impacts EU law, both directly and indirectly. First, EU jurisprudence recognises that under certain circumstances obligations under multilateral treaties, such as the IMF's Articles – to which all EU Member States are parties but the EU is not – may have a direct binding effect on the EU, to the extent that the EU assumes the Member States' competences under the TFEU related to these obligations. Second, the exercise of EU Member States' rights and obligations under the IMF's Articles indirectly affects the EU and EU law. This is because the EU has assumed from, or shares with, EU Member States certain competences relevant to the IMF's Articles. Third, the IMF and the EU also interact in other areas of common interest, thereby mutually influencing policy positions and leading to the use of similar concepts in their respective policies and laws. One example concerns the two organizations' surveillance, the IMF under Article IV of its Articles and the EU under a number of procedural frameworks, such as the Stability and Growth Pact. Similarly, IMF policy positions on collective action clauses have also impacted EU policy decisions. The EU's legal order is thus rather open to the influence by IMF law.<sup>54</sup>

Another example is formed by the World Intellectual Property Organization. The EU is not a member of the WIPO, whereas all its Member States are. Yet, in light of the strong link between the EU and WIPO, the autonomy of the EU in matters of intellectual property is relative. The European Union is among the most active international organizations at WIPO. The EU has been given either member or observer status by WIPO members for several internationally binding agreements and within various decision-making bodies. WIPO's norms, principles and practices are increasingly relevant to the development of intellectual property law within the EU legal order. Historically, the EU has incorporated both binding and non-binding

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<sup>51</sup> C. Eckes, 'The European Court of Justice and (Quasi-)Judicial Bodies of International Organisations', in Wessel and Blockmans, *op.cit.*, 85-109.

<sup>52</sup> E. Cornu, 'The Impact of Council of Europe Standards on the European Union', in Wessel and Blockmans, *op.cit.*, 113-129.

<sup>53</sup> P.J. Kuijper and F. Hoffmeister, 'WTO Influence on EU Law: Too Close for Comfort?', in Wessel and Blockmans, *op.cit.*, 131-158.

<sup>54</sup> W. Bergthaler, 'The Relationship Between International Monetary Fund Law and European Union Law: Influence, Impact, Effect, and Interaction', in Wessel and Blockmans, *op.cit.*, 159-198.

principles created via the WIPO mechanism. Whereas the WIPO norm-making process heavily influences the body and framework of intellectual property law in the EU, WIPO norms do not have independent normative value within the EU. The EU is not bound by new or evolving intellectual property principles unless, by virtue of its own authority, it chooses to be. Yet, there is clear evidence that the EU is able to act unilaterally to accept or discard intellectual property norms in its legal order.<sup>55</sup>

Turning to another specialised agency of the United Nations, the Food and Agriculture Organization (FAO), it has been observed that, over time, the relationship between the two international organizations has shifted from one between equal partners to a more hierarchical one between an organization and one of its members. It is exactly because the EU is a full member of the FAO that it is not wholly unsurprising to find that the EU legal order reveals substantial FAO influence, notably in five policy fields: fisheries, food law, animal health, international food security and forestry. Yet, the extent of these effects is ultimately determined by the EU legislator and judiciary. The normative impact of the FAO on the EU legal order manifests itself chiefly in terms of the direct incorporation of FAO standards in EU secondary legislation and in references to FAO standards in both EU policy instruments and the case law of the CJEU. In food law and animal health, the influence of the FAO is strongest in internal EU rules, whereas in the fields of fisheries, international food security and forestry, FAO influence is more prominent in external EU policies and actions.<sup>56</sup>

Notwithstanding the fact that the jurisdiction of the CJEU does not extend to Title V of the EU Treaty to the same extent as to other policy areas, it is nevertheless interesting to note that NATO's impact on the European Union's institutional design, policy-making and operational experience gathering in the field of security and defence has been "fundamental", even if only few traces of NATO are to be found in EU primary law. It is especially on the operational side, the *raison d'être* of the EU's Common Security and Defence Policy, that NATO's impact has been instrumental.<sup>57</sup> This is evidenced most vividly by the use, however limited in number, of the so-called 'Berlin Plus' arrangements, which have enabled the European Union to borrow NATO assets and capabilities in order to launch its first-ever military mission in 2003 (Proxima in Macedonia) and to continue its activities in Bosnia-Herzegovina (EUFOR Althea). Similarly, it has been noted that also in the Area of Freedom, Security and Justice (AFSJ) the EU is bound to respect the norms stemming from international organizations. Yet, while the EU legal order is open to external normative influences, only a couple of international organizations currently influence the development of the AFSJ. The most prominent examples are the United Nations and the Council of Europe, which muster the 1951 Geneva Convention on asylum seekers and refugees and the European Convention on Human Rights, respectively.<sup>58</sup>

Overall, studies over the past years have revealed an impact of many international decisions on the EU. These decisions may be taken by both formal international organizations and more 'informal' transnational, regulatory or treaty bodies.<sup>59</sup> Given this influence, the question is how we should assess the legal status of these decisions in the EU legal order.

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<sup>55</sup> E. Kwakwa and A. Talbott, 'The Influence of the World Intellectual Property Organization on the European Union', in Wessel and Blockmans, *op.cit.*, 199-216.

<sup>56</sup> F. Schild, 'The Influence of the Food and Agriculture Organization (FAO) on the EU Legal Order', in Wessel and Blockmans, *op.cit.*, 217-241.

<sup>57</sup> S. Blockmans, 'The Influence of NATO on the Development of the EU's Common Security and Defence Policy', in Wessel and Blockmans, *op.cit.*, 243-267.

<sup>58</sup> C. Matera, 'The Influence of International Organisations on the EU's Area of Freedom, Security and Justice: A First Inquiry', in Wessel and Blockmans, *op.cit.*, 269-296.

<sup>59</sup> See for examples Føllesdal, Wessel and Wouters, *op.cit.*



## 5. The Legal Status of International Decisions in the EU Legal Order

It was in the *Haegeman* case<sup>60</sup> that the Court presented the famous phrase that international agreements concluded by the European Union form “an integral part of Union law”. In 2009, the *American Air Transport Association* and others brought judicial review proceedings asking the referring court to quash the measures implementing the directive in the United Kingdom.<sup>61</sup> In support of their action, they pleaded that that directive was unlawful in the light of international treaty law and customary international law. In its ruling, the Court nicely summarised the main principles related to the effect of international law in the EU legal order. First of all, the Court confirmed that the EU is in principle bound by international law. This has indeed been standard case law ever since the *International Fruit Company* case in 1972.<sup>62</sup> Second, the Court can examine the validity of an act of European Union law in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this.<sup>63</sup> Finally, where the nature and the broad logic of the treaty in question permit the validity of the act of European Union law to be reviewed in the light of the provisions of that treaty, it is also necessary that the provisions of that treaty which are relied upon for the purpose of examining the validity of the act of European Union law appear, as regards their content, to be unconditional and sufficiently precise.<sup>64</sup>

The question of whether this status of international law is restricted to international agreements, or also extends to decisions of international organizations, has been less frequently discussed. Yet, as rightfully stated by Martenczuk, “international agreements [...] often establish a common institutional framework, including the creation of joint bodies authorized to take decisions with bring effect for the parties.”<sup>65</sup> Indeed, one starting point is formed by ‘secondary international law’ deriving from international agreements such as Association Council decisions. In *Sevince* – concerning the rights of Turkish workers under Decision 2/76 and 1/80 of the EC-Turkey Association Council – the Court held that these decisions are also to be seen as forming part of the EU’s legal order and may even have direct effect.<sup>66</sup> Earlier, the Court already recognised the legal effect of decisions of the same Association Council, without being explicit on the actual legal status.<sup>67</sup> And, in fact in *Greece v. Commission*, the Court already used *Haegeman*-like language: “since it is directly connected with the Association Agreement, Decision No. 2/80 forms, from the entry into force an integral part of the Community legal system”.<sup>68</sup>

While one could argue that Association Agreements and their Councils and comparable bodies are quite directly connected to the EU’s legal order on the basis of their very nature, there are no reasons to limit this reasoning that they constitute international bodies (especially when seen from the perspective of the third country) to the Association regimes. In *Opinion 1/76*, in relation to the question as to whether

<sup>60</sup> Case 181/73, *R. & V. Haegeman v Belgian State*.

<sup>61</sup> Case C-366/10, *Air Transport Association of America, American Airlines Inc., Continental Airlines Inc., United Airlines Inc. v Secretary of State for Energy and Climate Change*.

<sup>62</sup> Joined cases 21 to 24/72 *International Fruit Company NV v. Produktschap voor Groenten en Fruit*.

<sup>63</sup> See also Joined Cases C- 120/06 P and C- 121/06 P, *FIAMM and Others v Council and Commission*, par. 110.

<sup>64</sup> Case C-344/04, *Queen on the application of International Air Transport Association v. Department for Transport (IATA and ELFAA)*, par. 39, and *Intertanko (op.cit.)*, par. 45.

<sup>65</sup> B. Martenczuk, *op.cit.*, at 142.

<sup>66</sup> See for instance: Case C-192/89 *Sevince v. Staatssecretaris van Justitie*. Cf. also Case C-188/91, *Deutsche*

*Shell*, [1993] ECR I-363, para 17. Cf. also Nanette A.E.M. Neuwahl, ‘The European Parliament and Association Council Decisions: The example of Decision 1/95 of the EC/Turkey Association Council’ (1996) 33 *CMLR*, pp. 51–68.

<sup>67</sup> Case 204/86, *Greece v. Council* [1988] ECR 5323.

<sup>68</sup> Case 30/88, *Greece v. Commission* [1989] ECR 3711.

an agreement 'establishing a European laying-up fund for inland waterway vessels' is compatible with the provisions of the Treaty, the Court argued:

"the Community is [...] not only entitled to enter into contractual relations with a third country in this connexion but also has the power, while observing the provisions of the Treaty, to cooperate with that country in setting up an appropriate organism such as the public international institution which it is proposed to establish under the name of the 'European laying-up fund for inland waterway vessels'".<sup>69</sup>

The Court explicitly added that the 'organism' may be given "appropriate powers of decision".<sup>70</sup> In subsequent situations, such as the establishment and joining of the EU (at the time the EC) of the WTO<sup>71</sup>, the Court underlined this view. The current Treaties do not provide for a specific procedure for agreements to establish or join international organizations, which implies that the general rules of Article 218 TFEU apply. Indeed Article 218(1) TFEU refers to "agreements between the Union and third countries *or international organisations*" and Article 218(6)(a)(iii) TFEU mentions "agreements establishing a specific institutional framework by organising cooperation procedures" (as one of the cases requiring the consent of the European Parliament).<sup>72</sup> Examples include bilateral cooperation agreements, such as Partnership and Cooperation Agreements, but also other types of agreements which include the establishment of bodies with decision-making powers, such as the ones dealing with the mutual recognition of technical standards (concluded for instance with the US, Canada, Australia and New Zealand). Bodies are furthermore established by for instance the European Economic Area, the Energy Charter Treaty, the Energy Community Treaty and the European Common Aviation Area or on the basis of multilateral environmental agreements (MEAs).<sup>73</sup> The latter often use the terms Conference of Parties (COPs) or Meeting of Parties (MOPs) to refer to the bodies taking the decisions in the framework of MEAs.<sup>74</sup> While there is no consensus on whether COPs and MOPs could qualify as international organizations, "the fact remains that at the same time COPs/MOPs have been endowed with the competence to adopt binding decisions."<sup>75</sup> Or, as another observer held: "Like treaties, they compromise a specific normative framework of prescriptions that are particularly suitable to organizing internationally coordinated behaviour within a limited issue-area. Like international organizations, they provide a permanent mechanism for changing these normative prescriptions."<sup>76</sup>

The link with 'international agreements' remains nevertheless important. In the cases on decisions by Association Councils, the Court already pointed to the need for these decisions to be "directly connected" with the underlying international agreement. And in the absence of any specific provisions on decisions of international organizations, it would indeed be Article 218 TFEU that seems to offer the appropriate framework. The term 'international agreements' was broadly defined by the Court as to include "any undertaking entered into by entities subject to international law which has

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<sup>69</sup> *Opinion 1/76 re draft Agreement establishing a European laying-up fund for inland waterway vessels*, para. 5.

<sup>70</sup> *Ibid.*

<sup>71</sup> *Opinion 1/94 re WTO Agreement*.

<sup>72</sup> Emphasis added.

<sup>73</sup> See further Martenczuk, *op.cit.*

<sup>74</sup> See for instance T. Delreux, 'The EU as an actor in global environmental politics' in A. Jordan, C. Adelle (Eds.), *Environmental Policy in the EU: Actors, Institutions and Processes*, London, Routledge, 2012, pp. 287-305.

<sup>75</sup> Lavranos, *op.cit.*, at 81.

<sup>76</sup> Th. Gehring, 'International Environmental Regimes: Dynamic Sectoral Legal Systems', *YIEL*, 1990, pp. 35-56 at 54-55.

binding force, whatever its form or designation”.<sup>77</sup> The Court made this assessment in the framework of an Article 218(11) TFEU procedure on the basis of which “A Member State, the European Parliament, the Council or the Commission may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties.” It would seem that in its Opinion the Court should also take the possible decisions to be adopted by bodies established by international agreements into account.<sup>78</sup>

Apart from the above-mentioned references to international bodies in Article 218, paragraph 9 is perhaps even more explicit:

“The Council, on a proposal from the Commission or the High Representative of the Union for Foreign Affairs and Security Policy, shall adopt a decision suspending application of an agreement and establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.”

While the status of international decisions is still not clear from this provision, at least ‘bodies set up by an agreement’ are mentioned. More importantly however is that when introduced by the Treaty of Amsterdam, the procedure only applied to establishing the positions to be adopted on behalf of the Community in a body set up by an association agreement. The Nice Treaty extended the scope of application of the provision concerned to cover decisions having legal effects of bodies set up by any international agreement. It has been argued that “the Purpose of the introduction of this simplified decision-making procedure was presumably to take account of the case law of the Court of Justice according to which the status and effects, in the Union legal order, of such decisions of organs created by an international agreement concluded by the Community were essentially the same as those of the agreement itself.”<sup>79</sup> Furthermore, there do not seem to be reasons to limit this to treaty bodies set up by multilateral conventions, in which case the provision would also apply to ‘regular’ international organizations. Indeed, as argued by Heliskoski, Article 218(9)’s main *raison d’être* may flow from the very fact “that decisions of such bodies could have legal effects – including direct effect and primacy over secondary legislation – within the Union legal order without any subsequent act of adoption by the Union’s institutions”.<sup>80</sup>

Yet, while international organizations are (by definition) established on the basis of an international (constitutive) agreement, the EU is not always a party to that agreement, in which case the provisions in Article 218 would not apply and the source for the binding character of decisions on the Union should be found elsewhere. In the *CITES* case, for instance, the Commission sought the annulment of the decision of the Council establishing the position to be adopted on behalf of the European Community with regard to certain proposals submitted at a meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).<sup>81</sup> The Union is not a contracting party to CITES; it has observer status at Conferences of the Parties. However, since 1982 it has autonomously adopted measures designed to implement within the Union the

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<sup>77</sup> Opinion 1/75 *Local Cost Standard* [1975] ECR 1355, para. A; Opinion 2/92 *Revised Decision of the OECD on national treatment* [1995] ECR I-521, para II.1.

<sup>78</sup> Opinion 1/91 *EEA* [1991] ECR I-6079; Opinion 2/94 *ECHR* [1996] ECR I-1759; Opinion 1/00 *ECAA* [2002] ECR I-3493; Opinion 1/09 *European Patent Court* [2011] ECR n.y.r. Cf. also Martenczuk, *op.cit.* at 161.

<sup>79</sup> See the case note by J. Heliskoski, on Case 370/07, *Commission v. Council*, *CMLR*, 2011, pp. 555–567 at 557-558.

<sup>80</sup> *Ibid.* at 558.

<sup>81</sup> Case 370/07, *Commission v. Council* [2009] I-08917.

obligations of the Member States deriving from CITES. For the purpose of the present contribution the CITES case is also helpful as it clarifies that the Conference of the Parties (COPs) of CITES is empowered to adopt amendments to the Appendices to the Convention, the entry into force of which is not subject to ratification, and that the decisions of the COPs are clearly capable of producing legal effects not only with regard to the Member States as parties to CITES but also within the Union's legal order. Yet, the Court did not deal with the content of decisions, or their status and effect in Union law, although it has rightfully been argued that "the nature and effects of a decision to be taken by an international decision-making body should [...] play a crucial role in determining whether the establishment of the position of the Union in such a body should be conceived of as having legal effects in the Union legal order."<sup>82</sup>

In a currently pending case, the Court will have a chance to clarify the scope of Article 218(9). The case relates to decisions taken by the International Organization for Wine and Vine (IOV), of which the EU is not a member, but several of its Member States are. Given the EU's competences in the field, its intention is to upgrade its position in the IOV. On 19 June 2012, the Council by qualified majority with Germany voting against, adopted a decision establishing an EU position to be adopted in the OIV on the basis of Articles 43 and 218(9) TFEU. In the meantime, Germany (itself a member of the IOV) has brought an action for annulment against that decision challenging Article 218(9) TFEU as the correct legal basis for the adoption of the decision. Germany argues that Article 218(9) TFEU concerns only the adoption of the positions of the Union in bodies set up by international agreements of which the Union is a member. By contrast, Article 218(9) TFEU cannot be applied in relation to the representation of the Member States in bodies of international organisations in which only the Member States participate by virtue of separate international treaties. Furthermore, Germany takes the view that Article 218(9) TFEU covers only "acts having legal effects", meaning acts binding under international law, and that OIV resolutions are not acts in that sense. Finally, Germany argues that no other legal basis for the adoption of the Council decision is apparent.

On 29 April 2014 Advocate General Cruz Villalón delivered his Opinion and argued that Article 218(9) TFEU can only apply to bodies established by agreements to which the Union is a party. His arguments relate to the fact that the provision is clearly part of Title V ('International Agreements') of Part Five ('The Union's External Action') of the TFEU on international agreements concluded by the EU. Furthermore, the question is how to interpret the phrase "acts having legal effects" in Article 218(9). Germany takes the view that only decisions of an international organisation which are binding in international law may be regarded as acts 'having legal effects'. The Council and the Commission, on the other hand, consider that decisions of an international organisation which are incorporated into EU law by dynamic reference also have legal effects within the meaning of the contested provision. They further argue that even minor effects which a non-binding decision produces in international law are sufficient for that decision to be recognised as having legal effects. A fact is that over the years EU secondary legislation has contained dynamic references to the OIV resolutions. On the basis of a textual, contextual and teleological interpretation the AG concludes that "The phrase 'having legal effects' in Article 218(9) TFEU serves to indicate that the acts in question must have binding force in international law." In its final conclusion the AG holds that Article 218(9) TFEU does not therefore provide a suitable legal basis for the decision in the present case. Obviously, we will have to wait whether the Court will follow this reasoning, but the AG seems to use a solid reasoning. An interesting element is also that Article 8 of the OIV Agreement allows international organizations to become a

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<sup>82</sup> Heliskoski, *op.cit.*, at 364.

member of the organization, but so far EU Council Members have not been able to reach consensus on this.

What does this tell us about the status of international decisions in the EU legal order? Can we establish a link with Article 216(2) TFEU, on the basis of which “Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.”? The close connection which is visible both in the (modified) treaty provisions and in case law between ‘international agreements’ and ‘decisions made by bodies based on international agreements’ indeed points to this presumption.<sup>83</sup> Following Martenczuk: “to the extent that decisions of bodies established by international law have been validly incorporated into Union law, they are part of the Union legal order” and hence their uniform interpretation and application throughout the Union’s legal order is to be ensured,<sup>84</sup> in principle irrespective of their direct effect.<sup>85</sup> Allegedly this would imply the Court’s jurisdiction to give preliminary rulings on the interpretation of the decisions (as was confirmed for Association Council decisions in *Sevince*<sup>86</sup>). While Article 267 TFEU limits the preliminary procedure to “the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union” and ‘acts of other international bodies’ are not included,<sup>87</sup> it may be argued that the latter are a logical consequence of an earlier ‘act of the institutions’. In addition, sometimes international decisions enter the EU legal order only after a decision to that end was adopted by the EU institutions.<sup>88</sup> Along the same lines the infringement procedure (Article 258 TFEU) applies *mutatis mutandis*.

Yet, even if ‘Decisions based on Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States’, what then about decisions by other international bodies? While in a ‘CITES-situation’ the Union may have adopted the legal effects of decisions of the COPs or another international body, it would be difficult to provide a general answer. Decisions by international organizations of which the Union is not a member or of bodies based on international agreements to which the EU is not a party (or of international bodies not based on an international agreement at all) can have legal effects in the sense that they may ‘influence’ EU decision-making, but they would need to be binding on the Union to actually enjoy the hierarchically higher status comparable to international agreements in order to be able to set aside existing Union law. Conceptually speaking, it does not make any difference if an international norm that arrives at the border of the EU legal order is generated by an international organization or whether it belongs to a less organized body of public international law. In order to have an impact on the EU legal order, all international norms will, regardless of their origins, have to be binding on the EU. Furthermore, the nature and the broad logic of these international norms should not preclude this binding force.<sup>89</sup>

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<sup>83</sup> A similar conclusion was drawn by Lavranos, *op.cit.*, at 237-238: “decisions of IOs enjoy the same legal status within the Community legal order as treaties [...] and obtain Community law features such as supremacy over all domestic law of the Member States and direct effect if they meet the criteria [...]”. See for a recent analysis of the status of international agreements M. Mendez, *The Legal Effects of EU Agreements: Maximalist Treaty Enforcement and Judicial Avoidance Techniques*, Oxford: Oxford University Press, 2013.

<sup>84</sup> Martenczuk, *op.cit.* at 161. In this quotation ‘Community’ was replaced by ‘Union’.

<sup>85</sup> Cf. Lavranos, *op.cit.*, at 83 (in relation to COPs/MOPs decisions). And at 233: “the binding decisions are – to a varying degree – communitarized, thereby obtaining Community law features, such as supremacy over conflicting secondary EC law and all national law of the EU Member States and possible direct effect”.

<sup>86</sup> *Op.cit.*, para. 10.

<sup>87</sup> See on this point also A. Peters, ‘The Position of International Law Within the European Community Legal Order’, *GYIL*, 1997, p. 9 at pp. 12-14.

<sup>88</sup> Martenczuk, *op.cit.* at 162.

<sup>89</sup> Cf. van Rossem, *op.cit.*

## 6. Concluding Observations

The question of the status of decisions by international organizations and other bodies (termed 'international decisions' in this contribution) in the Union's legal order has gained importance. First of all international organizations changed from international frameworks for cooperation to more 'autonomous' norm-creating international bodies. Secondly, there has been a proliferation of international norm-creating and/or regulatory bodies, alongside the already existing formal international governmental organizations. Thirdly, the decisions of all these international bodies are more and more influencing each other, resulting in a 'global normative web' that also impacts the European Union.

The status of these international decisions in the EU legal order is not as clearly regulated or clarified as the status of international agreements and customary law. Yet, this Paper shows that there are good reasons to follow the *Haegeman*-doctrine and start from the presumption that international decisions form 'an integral part of EU law'. In fact, the doctrinal analysis of the status of international agreements may *mutatis mutandis* be applied to international decisions, including their position 'between primary and secondary law', keeping in mind that "[w]hilst the EU in principle automatically incorporates treaties it concludes into its legal order, it is the EU legal order that will ultimately determine the types of internal effect which such Agreements can display and, indeed, can potentially deprive them, through ex post review, of internal legal effects where they clash with EU primary law."<sup>90</sup>

Given the wide range of topics covered by international bodies and the diverging legal nature of their decisions, this does not make the overall question raised by this contribution any easier to answer. Indeed, the question of the *reception* of the international norms seems to be decisive in establishing their status. This line of reasoning points to a more dynamic influence of international law on the EU. Where negotiations on international agreements may very well take the 'primary law' aspects of the agreement into consideration, it is much more difficult to predict any 'secondary law' based on the agreement. Yet, following the interpretation of both the treaty provisions and the relevant case law it would be difficult to come to a different conclusion. Once the EU has joined an international organization or becomes a party to an international agreement on the basis of which international decisions can be taken, these decisions not only influence the EU legal order, but – when binding – also become an integral part of that order. The presumption suggested above would at least hold for decisions of Association Councils (and similar bodies) and for decisions of bodies (and conferences of state parties) based on agreements to which the Union is a party or where it has accepted the legal effects through internal legislation. As such, these decisions may also obtain EU law features such as supremacy and possible direct effect – features that they previously did not necessarily possess.<sup>91</sup> This may even be possible in cases where the EU itself is not a member of the particular international organization (such as in the case of the ICAO) or treaty regime (CITES). In cases where Member States are not a member of an international organization, but the EU is (for instance the regional fisheries organizations), the international decisions reach the Member States as (supreme) EU law and not as international law of which the status is determined by their national constitutions.<sup>92</sup> The possible impact of international decisions on fundamental rights,

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<sup>90</sup> Mendez, *op.cit.*, at 320.

<sup>91</sup> Cf. Lavranos, *op.cit.*, at 238.

<sup>92</sup> Lavranos, *op.cit.*, noted an interesting correlation between the instruments used for implementation of decisions of international organizations and the EU scope of competence: "In the case of exclusive competence of the EC ( Fisheries, SC, GATT), the EC uses Regulations as the main instrument, whereas in the cases of concurrent competences, the EC appears to prefer Directives as the main instrument for the implementation of decisions of IOs – although sometimes also Regulations or Council

the principles of democracy and rule of law, have been analysed extensively, in particular in the context of the *Kadi* saga.

The fact remains that, unlike international agreements, international decisions usually do not require ratification to enter into force. This may be particularly problematic when the notion of 'international decisions as integral part of EU law' is combined with majority decision-making at the international level, potentially allowing non-EU members to create supreme EU law. Again, this issue became apparent in many of the anti-terrorism cases. At the same time it is clear that in most cases international bodies work on the basis of consensus or offer a way to opt out.

Decisions by international organizations or other international bodies can have legal effects in the sense that they may 'influence' EU decision-making, but they would need to be binding on the Union to actually enjoy the hierarchically higher status comparable to international agreements in order to be able to set aside existing EU law. Conceptually speaking therefore, it does not make any difference if an international norm that arrives at the border of the EU legal order is generated by an international organization or whether it belongs to a less organized body of public international law. In order to have an impact on the EU legal order, all international norms will, regardless of their origins, have to be binding on the EU.

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Decisions are used. Also in the case where the EC is not a member of the IO (ICAO), the EC used Directives when it implements Annexes adopted by the ICAO Council.”.





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